IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	*	
v.	*	**Criminal No. PX-16-0434**
KEVIN HEITING	*	

* * * * * * * * * * * * *

CONSOLIDATED REPLY IN SUPPORT OF MOTIONS TO SUPPRESS

I. The nighttime execution of a daytime warrant violates the Fourth Amendment.

The question of whether officers executed the search warrant at Mr. Heiting's home before or after 6 a.m. is a factual issue to be resolved by evidence presented at the hearing on this motion. The data points referenced by the government—even if they were established as true at the hearing—would not prove that the warrant was executed after 6 a.m. Indeed, the fact that enough of the search had been completed by 6:26 a.m. for Agent Carlson to be conducting an interview of Mr. Heiting at that time suggests the opposite. The fact that it was daylight by the time photographs were taken is hardly dispositive; it is more likely that photographs were taken at the conclusion of the search than at the beginning.

The government's request that the Court resolve this issue without a hearing is misplaced. The government cites *United States v. Cranson*, 453 F.2d 123, 126 (4th Cir. 1971), but that case concerned a defendant's request *during trial* for a hearing outside the presence of the jury regarding pre-trial identification procedures prior to an in-court identification. Its holding—that requests for such hearings should ordinarily be made before trial and have "solidity"—is inapposite here. Mr. Heiting has made a timely pretrial motion to suppress evidence based on a violation of his Fourth Amendment rights, and has articulated the specific violation that he challenges. He is entitled to an evidentiary hearing to resolve the issue.

If the Court finds that the search was executed before 6 a.m., the government's reading of *Yanez-Marquez v. Lynch*, 789 F.3d 434 (4th Cir. 2015), is incorrect. Though the Fourth Circuit held that suppression was not warranted in that case, the case involved a challenge to civil immigration removal proceedings, not a criminal prosecution. In immigration removal proceedings, to achieve suppression of evidence, the petitioner must not only demonstrate that a Fourth Amendment violation occurred, but must also overcome an additional hurdle of showing that the Fourth Amendment violation was egregious. *Id.* at 449-51. No such egregiousness requirement exists in criminal law. The ultimate decision, on the egregiousness prong, that the evidence in *Yanez-Marquez* should not be suppressed is irrelevant to this case.

In *Yanez-Marquez,* the Fourth Circuit clearly held that the nighttime execution of a daytime warrant violates the Fourth Amendment. *Id.* at 467. The court placed no limitation or qualification on that holding. The fruits of that violation therefore should be suppressed. *See Mapp v. Ohio,* 367 U.S. 643, 656–57 (1961); *Weeks v. United States*, 232 U.S. 383 (1914).

II. The continued detention of Mr. Heiting's Dell laptop for several weeks exceeded the permissible scope of a border search and was unreasonable.

There is no unlimited exception to the warrant requirement at border crossings. Rather, any such seizure must be supported by at least reasonable suspicion of criminal activity and be limited in duration. *See United States v. Montoya de Hernandez,* 473 U.S. 531, 544 (1985); *see also United States v. Place,* 462 U.S. 696, 709 (1983). In the present case, the seizure of Mr. Heiting's laptop and the intervening detention of that laptop for several weeks before the government obtained a warrant to search it exceeded the reasonable duration of a warrantless border seizure.

The government makes no credible argument that Mr. Heiting was subjected to a "routine" border search and seizure. The government admits Mr. Heiting was under investigation and that he was pulled for secondary screening because his name was in an HSI database because of that ongoing investigation. ECF No. 46 at 5. Thus, the question is whether the seizure and subsequent search of the warrant meets the requirements of a non-routine border search.

The government had no reasonable suspicion to believe that Mr. Heiting's laptop contained any contraband when it was seized at the border. Mr. Heiting's behavior when questioned by CBP officers, even if accurately described in the government's pleading, was neither unreasonable nor indicative of criminal activity. This is particularly true in light of the fact that Mr. Heiting's last interaction with law enforcement had been when they forcibly entered his home while he was sleeping in order to execute a search warrant.

The government offers no evidence that it had any particularized suspicion of contraband on Mr. Heiting's laptop except the fact that Mr. Heiting, who was under investigation, was its owner. By contrast, in *United States v. Feiten*, Case No. 15-20631, 2016 WL 894452, at * 4 (E.D. Mich. March 9, 2016), cited by the government, a Customs officer observed "child erotica" on the laptop of a defendant who was carrying "studio-type photographic equipment" and returning from a county known for child pornography and child sex tourism. And in *United States v. Cotterman*, 709 F.3d 952, 968-70 (9th Cir. 2013), also cited by the government, the defendant was returning from "a country associated with sex tourism" and had been previously *convicted* of child molestation.

Even if the government had reasonable suspicion to seize and search Mr. Heiting's laptop at the time he crossed the border, the continued seizure of that laptop for several weeks renders the seizure unreasonable and therefore unconstitutional. "[A] seizure reasonable at its inception . . . may become unreasonable as a result of its duration . . . ." *Segura v. United States*, 468 U.S.

796, 812 (1984). This Court has held that "an extended border search requires reasonable suspicion with respect to the criminal nature of the person or thing searched as well as reasonable suspicion that the subject of the search has crossed a border within a reasonably recent time." *United States v. Saboonchi*, 990 F. Supp. 2d 536, 547 (D. Md. 2014). In *Saboonchi*, the government searched the laptop five days after Mr. Saboonchi crossed the border. Here, the government waited approximately six weeks. By that point, Mr. Heiting had not crossed the border "within a reasonably recent time" and the continued seizure of his computer was unreasonable.

The Supreme Court has held that an extended warrantless border seizure is permissible, but only in a circumstance where the duration of the seizure was largely caused by the defendant. *See Montoya de Hernandez*, 473 U.S. at 544.[1] Mr. Heiting did nothing to prevent the government from searching his laptop. Further, although the government explains that the initial warrant became stale because of an agent's illness, the government provides no explanation at all for why it took almost a month for Special Agent Carlson to seek a warrant at all. The laptop was seized on August 9, 2016, and the initial warrant application was not made until September 7, 2016. It was unreasonable for the government to keep the laptop for almost a month without seeking a warrant. Moreover, the government's decision to allocate resources in such a manner that the illness of a single agent—hardly an unforeseeable circumstance—would delay a forensic search by weeks, does not render reasonable an otherwise unreasonable period of retention.

[1] Though *Montoya de Hernandez* involved the seizure of a person, not property, this Court has recognized that an individual's property interest in an electronic device is extraordinarily strong, due to the nature of the personal information regularly stored on personal computers. *See Saboonchi*, 990 F. Supp. 2d at 568 (Though a forensic search of a computer "lacks the discomfort or embarrassment that accompanies a body-cavity search, it has the potential to be even more revealing.").

Though the government claims the seizure in this case was consistent with ICE policies (ECF No. 46 at 18-19) and therefore was reasonable, a closer examination of the ICE Directive the government cites reflects that the seizure of Mr. Heiting's laptop did not meet ICE's own standards. The Directive, like the case law that has developed in this area, requires that any search be conducted "in a reasonable time given the facts and circumstances of the particular search." ECF No. 46 at 19, Directive at 8.3(1). There is no statement that 30 days is, *per se*, a reasonable amount of time to wait before searching an item seized at the border. Again, though the government provides an explanation for why it waited longer than 30 days to conduct the search, it provides no explanation for why it waited until almost a month after the seizure to even seek a warrant. It therefore has not demonstrated that the "facts and circumstances" of this particular seizure made its duration reasonable.

Finally, the government admits its reliance on the border search authority to seize Mr. Heiting's laptop was entirely pretextual. The government may not use an exception to the warrant requirement that vitiates the need for probable cause to pursue specific criminal investigations. *See Colorado v. Bertine*, 479 U.S. 367, 375 (1987) (In conducting inventory searches discretion must be "exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity."); *N.Y. v. Burger*, 482 U.S. 691, 716 n.27 (1987) (Administrative search scheme was proper because it was not pretextual.); *see also United States v. Ford*, 986 F.2d 57, 60 (4th Cir. 1993) (Inventory search was proper where "[t[he record [was] devoid of any indication that [the officer] improperly utilized an inventory search to verify a suspicion of criminal activity."). Here, Mr. Heiting's laptop was seized pursuant to an ongoing investigation, not pursuant to any border-related concern. Yet, the government continues to rely on the border exception to the warrant requirement to justify its extended delay in seeking a warrant to search Mr. Heiting's laptop.

The "border search doctrine" may dictate that Mr. Heiting had a diminished expectation of privacy in his effects while crossing the border. *See United States v. Ramsey*, 431 U.S. 606, 616 (1977). But, that diminished expectation of privacy does not amount to an agreement that the government could indefinitely detain his most personal possessions. By continuing to detain Mr. Heiting's laptop without a warrant for the purpose of searching it in concert with an ongoing investigation, the government has violated Mr. Heiting's Fourth Amendment rights. The evidence obtained as a result of that detention must therefore be suppressed.

III. The warrant to search Mr. Heiting's laptop and cell phone was not supported by probable cause.

The affidavit in support of the warrant the government obtained to search Mr. Heiting's Dell laptop computer and Samsung Galaxy 6 cell phone (the "Device Warrant") is materially different from the affidavit in support of the search warrant the government obtained to search Mr. Heiting's home. The earlier search warrant contained specific facts tying Mr. Heiting's home to potential criminal activity, through the suspected distribution of child pornography via a virtual private network tied to his home IP address. By contrast, the affidavit in support of the devices warrant proffered no nexus between Mr. Heiting's electronic equipment and any specific criminal activity, beyond the fact that the equipment belonged to Mr. Heiting.

"In determining whether a search warrant is supported by probable cause, the crucial element is not whether the target of the search is suspected of a crime, but whether it is reasonable to believe that the items to be seized will be found in the place to be searched." *United States v. Lalor*, 996 F.2d 1578, 1582 (4th Cir. 1993) (citing *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 & n.6 (1978)). Here, the government proffered three types of evidence in support of its warrant application: (1) general statements about use of computers and child pornography; (2) evidence that Mr. Heiting had, months earlier, possessed child pornography on a computer; and (3) observations of Mr. Heiting's behavior and statements at the airport. (ECF No. 46, Ex. 2.) None of this evidence provided probable cause on which a magistrate judge could reasonably have found a nexus between the specific devices the government sought to search and any criminal activity.

The general statements about child pornography and computer use and the evidence related to the search of Mr. Heiting's home had no relationship to the devices covered by this warrant. That Mr. Heiting had potentially possessed child pornography months earlier on devices located within his home did not provide probable cause to believe that he would possess child pornography months later on devices he carried in public. By the government's logic, the mere fact that someone is under investigation for an earlier crime would create ongoing, indefinite probable cause to continue searching places and electronic devices associated with that person. Such a policy would amount in effect to the type of "general warrant" forbidden by the Fourth Amendment, and would invite the gross abuses of power that prohibition was intended to curtail.

Mr. Heiting's behavior at the Atlanta airport also did not provide the necessary nexus. As discussed in the previous section, that Mr. Heiting may have seemed nervous was reasonable given his most recent encounter with law enforcement. That he allegedly said his laptop was "sensitive" likewise did not reasonably support probable cause to believe he was involved in criminal activity. As the Supreme Court and this Court have recognized, personal electronic devices and computers regularly contain all types of extraordinarily sensitive, lawful information. *See Riley v. California*, ____ U.S. ____, 134 S. Ct. 2473, 2489 (2014); *Saboonchi*, 990 F. Supp. 2d at 569 ("It is difficult to conceive of a property search more invasive or intrusive than a forensic computer search."). A personal electronic device, like a laptop or cell phone, would almost always be "sensitive."

Here, Special Agent Carlson "could not have harbored an objectively reasonable belief in the existence of probable cause" based on the lack of nexus between the existing evidence against Mr. Heiting and the devices covered by the warrant application. Accordingly, the good faith exception does not apply, and the evidence seized from Mr. Heiting's laptop and cell phone should be suppressed. *See United States v. Leon*, 468 U.S. 897, 926 (1984)

IV. Mr. Heiting's statements to law enforcement during the execution of the search warrant at his home and at the airport were involuntary.

The parties essentially agree on the applicable law relating to Mr. Heiting's statements, but vigorously disagree on the application of the law to the facts of this case. Under the applicable law, even by the government's version of the facts, Mr. Heiting maintains that his statements were the fruits of custodial interrogation, without *Miranda* warnings, and were also involuntary and therefore should be suppressed.

a. Mr. Heiting's statements to law enforcement outside his home should be suppressed.

The government correctly states a number of "relevant factors" the Court must consider when determining whether an interrogation was custodial. These include "physical restrictions on the suspect, the suspect's isolation and separation from family, the time, place and purpose of the encounter, the words used by the officer, the officer's tone of voice and general demeanor, the presence of multiple officers, the potential display of a weapon by an officer, and whether there was any physical contact between the officer and the defendant." (ECF No. 46 at 28 (quoting *United States v. Hashime*, 734 F.3d 278, 283 (4th Cir. 2013).)

By the government's own report, Mr. Heiting was questioned in the early morning hours, after having been awoken by law enforcement officers from three separate agencies executing a search warrant on his home. (ECF No. 46 Ex. 5.) He was alone, without any friends or family. Officers removed him from his home and placed him inside a police vehicle, where he was questioned while outnumbered two to one by officers. (ECF No. 46 Ex. 4.) While Mr. Heiting was questioned for over an hour, ECF No. 46 at 10-11, several other officers continued to execute a search warrant on his home. A reasonable person in this situation would not have felt "free to leave." That the agents did not keep Mr. Heiting in custody after the conclusion of this encounter is irrelevant. Mr. Heiting had no way to know that that would be the case when the interrogation was conducted. He was therefore in custody at the time of his interrogation and any statements he made were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966).

b. Mr. Heiting's statements at the Atlanta airport should be suppressed.

Though questioning may be more common at the border, "there is no broad border exception to *Miranda*'s requirements." *United States v. Carr*, 63 F. Supp. 3d 226, 236 (E.D.N.Y. 2014) (citing *United States v. FNU LNU*, 653 F.3d 144 (2d Cir. 2011)). The Court must still determine whether based on the totality of the circumstances the individual being questioned would have felt free to leave. *See Saboonchi*, 990 F. Supp. 2d at 544 (citing *FNU LNU*, 653 F.3d at 153-54). The circumstances surrounding Mr. Heiting's interrogation in the airport amount to a custodial interrogation and any statements he made were there for obtained in violation of *Miranda*.

When Mr. Heiting was pulled into a secondary examination there is no question he was not free to leave and continue on with his itinerary, at least during the time of questioning. Further, he was questioned by both agents from Customs and Border Protection and agents from

Homeland Security Investigations. In total, based on the government's reports, at least five law enforcement officers were present. (ECF No. 46, Ex. 7 at 2-3.). These facts, and others that will be presented at the hearing on this motion, suggest Mr. Heiting would not have felt free to leave, and that law enforcement were therefore required to inform him of his *Miranda* rights before questioning him.

CONCLUSION

Mr. Heiting was subjected to a series of unconstitutional searches, seizures and interrogations. For the foregoing reasons, he respectfully requests that the Court suppress the evidence obtained as the fruit of those unconstitutional actions.

Respectfully submitted,

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